

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2026-024948

(1)	<u>REPORTABLE: YES</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES</u>
DATE	19 May 2026
	 SIGNATURE

In the matter between:

MOGADITSWE DAVID TUMELO MOHAU

First Applicant

LETSATSI KGOSIETSILE KINGSLEY

Second Applicant

NGWENYA SAMKELO NTOKOZO

Third Applicant

NTELEZA BOITUMELO JONATHAN

Fourth Applicant

MATLOU PAULOOS KGAMANE

Fifth Applicant

WAMBI SUNNYBOOI PINNY

Sixth Applicant

AND

**THE DIRECTOR OF PUBLIC PROSECUTOR
JOHANNESBURG**

First Respondent

**DIRECTORATE FOR PRIORITY CRIME
INVESTIGATIONS**

Second Respondent

JUDGMENT

MIA, J

Introduction

- [1] The applicants are members of the South African Police Services in the Directorate of Priority Crime Investigation. They were arrested and applied for bail in the Randburg Magistrates Court where bail was granted without any conditions attached. The Director of Public Prosecutions acting in terms of section 65A of the Criminal Procedure Act 51 of 1977 (the CPA), filed an application to appeal the decision to grant bail. The High Court per Karam AJ, set aside the magistrate's decision admitting them to bail, and directed them to surrender themselves to the nearest police station on or before 23 January 2026, failing which warrants for their arrest would issue. The applicants then launched an urgent application in this court.
- [2] The relief sought by the applicants in this urgent application, is an order suspending or holding in abeyance the operation and execution of the order granted by Karam AJ on 16 January 2026 in relation to the bail appeal brought by the State. The applicants contend that the noting of an application for leave to appeal suspended the operation of that order alternatively that this Court, exercising its inherent powers under s 173 of the Constitution, should suspend the operation of the order pending the determination of the contemplated appellate processes.
- [3] The respondents oppose the application on the grounds, inter alia, that the matter is self-created urgent, that s 18 of the Superior Courts Act 10 of 2013 does not apply to criminal proceedings governed by the CPA, and that this Court lacks authority to suspend the operation of the bail appeal order.

Urgency

- [4] The matter directly implicates the applicants' liberty interests. A threatened deprivation of liberty ordinarily engages urgent considerations. Moreover, questions concerning incarceration and bail are ordinarily urgent.

- [5] The respondents submit that the urgency is self-created because the applicants delayed instituting proceedings despite being aware of the order granted on 16 January 2026 by Karam AJ. The respondent's contention is compelling in that the applicants were aware on 16 January 2026 that their bail had been revoked and that they were required to surrender themselves by 23 January 2026. The applicants' papers do however reveal that they promptly sought legal advice, filed an application for leave to appeal on 20 January 2026, requested reasons and transcripts, and initially attempted to obtain urgent enrolment before Wilson J on 23 January 2026 prior to the expiry of the surrender deadline.
- [6] Although, the explanation for the delay is not entirely satisfactory, particularly insofar as it relies on internal procurement arrangements within the SANDF, the threatened deprivation of liberty renders the matter sufficiently urgent to warrant consideration on the merits.

Issues

- [7] The principal issues are:
- 7.1 whether the noting of an application for leave to appeal automatically suspended the operation of the order granted by Karam AJ;
 - 7.2 whether this Court possesses inherent jurisdiction under s 173 of the Constitution to suspend the operation of the order pending appeal proceedings;
 - 7.3 whether the applicants have established exceptional circumstances justifying such relief; and
 - 7.4 whether the constitutional challenge mounted against the CPA is properly before this Court.

The statutory and legal framework

- [8] Bail proceedings in criminal matters are governed principally by Chapter 9 of the CPA. Section 65A¹ permits the State, in specified circumstances, to appeal against the granting of bail. The order made by Karam AJ was made pursuant to that statutory criminal appellate process when the State appealed the decision of the Magistrates Court which granted bail.
- [9] The applicants submit that because the CPA does not expressly regulate suspension of a bail appeal order pending further appeal proceedings, the common-law rule applies, namely that the noting of an appeal automatically suspends the operation and execution of the order appealed against. The applicants place reliance particularly on *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.² The applicants further rely on s 18 of the Superior Courts Act and submit that the statutory and common-law position applicable in civil matters should apply equally in the present context. In addition, the applicants invoke this Court's inherent jurisdiction under s 173 of the Constitution to regulate its own process and develop the common law in

¹ "65A. Appeal by attorney-general against decision of court to release accused on bail.—(1) (a) The attorney-general may appeal to the superior court having jurisdiction, against the decision of a lower court to release an accused on bail or against the imposition of a condition of bail as contemplated in section 65 (1) (a).

(b) The provisions of section 310A in respect of an application or appeal referred to in that section by an attorney-general, and the provisions of section 65 (1) (b) and (c) and (2), (3) and (4) in respect of an appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

(2) (a) The attorney-general may appeal to the Appellate Division against a decision of a superior court to release an accused on bail.

(b) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the attorney-general appeals in terms of paragraph (a) of this subsection.

(c) Upon an appeal in terms of paragraph (a) or an application referred to in paragraph (b) brought by an attorney-general, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.

(3) If the appeal of the attorney-general in terms of subsection (1) (a) or (2) (a) is successful, the court hearing the appeal shall issue a warrant for the arrest of the accused.

[S. 65A inserted by s. 7 of Act No. 75 of 1995]."

² 1977 (3) SA 534 (A).

the interests of justice. The applicants also refer to further authorities including *Liesching v S*,³ *Phillips v National Director of Public Prosecutions*,⁴ *Molaudzi v S*⁵ and *Thebus v S*.⁶

- [10] In *Phillips*,⁷ the Court referred to circumstances in which the Court could regulate its own process and specified that it would be appropriate where there is a lacuna in the legislation. In *Molaudzi*, the Court indicated that it is appropriate to regulate its own processes in circumstances where it is faced with inadequate procedures and rules and no mechanism to deal with a particular scenario.⁸
- [11] The respondents contend, that the CPA contains no provision expressly suspending the operation of a successful State bail appeal pending further appellate proceedings. They further contend that s 18 of the Superior Courts Act does not directly regulate criminal bail proceedings under the CPA.

The applicability of the Superior Courts Act

- [12] It would be incorrect to conclude, in absolute terms, that the Superior Courts Act has no application whatsoever in criminal appellate proceedings. In *Liesching*⁹, the Constitutional Court recognised that aspects of Chapter 5 of the Superior Courts Act may complement and supplement the CPA where the latter does not regulate a particular procedural question exhaustively. Similarly, in *Van Wyk v S, Galela v S*,¹⁰ the Supreme Court of Appeal held that certain appellate mechanisms created by the Superior Courts Act supplement criminal appellate procedures under the CPA where the CPA is silent. Those authorities demonstrate that the relationship between the CPA and the

³ [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC); 2019 (4) SA 219 (CC).

⁴ [2005] ZACC 15; 2006 (2) BCLR 274 (CC); 2006 (1) SA 505 (CC).

⁵ [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC).

⁶ [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC).

⁷ *Phillips* op cit n 4.

⁸ *Molaudzi* op cit n 5 para 31.

⁹ *Liesching* op cit n 3.

¹⁰ [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA).

Superior Courts Act is not one of complete mutual exclusion. That, however, does not resolve the present dispute.

- [13] Neither *Liesching* nor *Van Wyk* concerned the suspension of a criminal bail appeal order pending leave to appeal proceedings. Both decisions dealt principally with appellate structures, jurisdiction, and the interaction between Chapter 5 of the Superior Courts Act and criminal appellate procedures under the CPA. The applicants' reliance on the ordinary common-law rule concerning suspension upon appeal also encounters difficulty in the present context.
- [14] The rule articulated in *Southern Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*¹¹ developed primarily in the context of civil execution proceedings. The rationale for the rule is preservation of the status quo pending the final determination of civil disputes. The purpose of bail proceedings addresses the balancing rights of an accused person right to freedom and thus to be released on bail with that of the rights of members in society to be free from harm and safe. The context in which bail proceedings occur are materially different to the civil execution processes in *South Cape Corporation*. Bail concerns the interim liberty within the criminal process and is governed by a distinct statutory regime directed at the interests of justice, the administration of criminal proceedings, and public safety.
- [15] Section 65A itself reflects a legislative purpose that, in appropriate circumstances, the State may obtain urgent appellate reconsideration of a bail decision considered erroneous. The CPA contains no indication that the mere noting of an application for leave to appeal automatically restores or preserves bail once a High Court has overturned the grant of bail on appeal. Had Parliament intended such an automatic consequence, one would expect the CPA to provide expressly for it. I am therefore unable to conclude that the noting of the application for leave

¹¹ 1977 (3) SA 534 (A).

to appeal should automatically suspend the operation of the order granted by Karam AJ.

Inherent jurisdiction under section 173

- [16] The applicants' stronger argument rests not on automatic suspension but on this Court's inherent jurisdiction under s 173 of the Constitution. Section 173 confers on superior courts the inherent power to protect and regulate their own process and to develop the common law considering the interests of justice. The Constitutional Court has repeatedly emphasised, however, that the power conferred by s 173 is not unbounded. In *Phillips*, the Constitutional Court held that the inherent power recognised in s 173 must be exercised sparingly and consistently with the Constitution and legislation.¹² In *Molaudzi*, the Constitutional Court reiterated that the inherent power to regulate process relates primarily to procedural and adjectival matters and does not ordinarily extend to the creation of substantive rights inconsistent with legislation.¹³ The same principle emerges from *Thebus*, where the Constitutional Court explained that development of the common law under s 39(2) proceeds within the constitutional framework and not in disregard of legislation enacted by Parliament.¹⁴
- [17] The present application effectively seeks judicial creation of an interim entitlement permitting the applicants to remain at liberty notwithstanding the successful State appeal revoking their bail. That relief would substantially alter the legal effect of the order granted by Karam AJ and introduce into the CPA a suspension mechanism not expressly created by the Legislature. Even if this Court possesses residual power in exceptional circumstances temporarily to regulate the implementation of criminal orders in the interests of justice, that power must be exercised with considerable restraint, particularly in the context of criminal bail proceedings carefully regulated by statute.

¹² *Phillips* op cit n 4 para 48.

¹³ *Molaudzi* op cit n 5 para 33.

¹⁴ *Thebus* op cit n 6 para 27.

- [18] The applicants have not demonstrated exceptional circumstances justifying such intervention. The applicants rely heavily on the fact that they had previously complied with bail conditions and remained on bail for several months. That consideration may be relevant in future bail-related proceedings. It does not establish a legal entitlement to suspension of the bail appeal order. Nor can it be ignored that the applicants did not comply with the surrender order issued by Karam AJ. Although explanations are offered concerning pending legal processes, consultations, and subsequent events, the order remained operative unless suspended or set aside by a competent court. In all the circumstances, the applicants have not established a proper basis for the exercise of this Court's inherent jurisdiction in their favour.

The constitutional challenge

- [19] The applicants further seek declaratory relief to the effect that the CPA is constitutionally invalid to the extent that it fails expressly to provide for suspension of bail appeal orders pending leave to appeal proceedings. That challenge is not properly capable of determination in these urgent proceedings for several reasons. First, no proper Rule 16A notice appears to have been given, the Minister of Justice and Constitutional Development has not been joined. Where a constitutional challenge has been initiated, it is important to ventilate the challenge fully. The constitutional challenge is insufficiently developed in the papers and arises in truncated urgent proceedings without the benefit of full argument directed to the constitutional validity of the legislative scheme. In these circumstances, it would be inappropriate to determine the constitutional validity of the CPA provisions implicated in this matter.

Costs

- [20] The matter raises constitutional and procedural questions concerning liberty and the interaction between the CPA, the Superior Courts Act, and the Court's inherent jurisdiction. Although the application cannot succeed, it cannot be characterised as frivolous or vexatious. Nothing in the order below precludes the applicants from pursuing any competent

appeal or bail-related relief available in law. In the exercise of my discretion, no adverse costs order should follow.

Order

[21] The following order is made:

1. The application is dismissed.
2. The constitutional relief sought is dismissed.
3. There is no order as to costs.

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S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:**Attorneys for the Appellant:**

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Date of hearing:

:10 February 2026

Date of judgment:

: 19 May 2026